

90. 79

Sir Christopher Musgrave, *Bart.* : - - - Appellant.

John Brisco, *Esq.*; Richd. Ward, and Dorothy his *Wife* - Respondents.

The Appellant's C A S E.

THE Appellant and *Gilfrid Lawson, Esq.* stood Candidates and joined their Interests to represent the County of *Cumberland* in Parliament, at the Desire of several Gentlemen, who used their Endeavours to assist them and promote their Election, which happened in *April, 1722.*

The Respondent *Brisco*, who was a Friend to, and promoted the Appellant's Interest, having advanced 200 *l.* on the Election Account; the Appellant, on or about the 13th Day of *March*, in the Year 1722, sent his Steward *Mr. Gibson*, to the Respondent (who had before acquainted the Appellant with his want of Money) to make Satisfaction to the Respondent on Account of the Election; and the said *Mr. Gibson* then made him full Satisfaction, without deducting 100 *l.* due from the said Respondent to the Appellant, for Money lent on his Note, bearing Date the 25th of *April, 1722*; and the said *Gibson* then desired to know if the Respondent had any farther Demands on the said Election Account, who answered, That he would have nothing more, for that the Appellant had been very generous and kind to him on Account of the Election, and had overdone it.

The Respondent *Brisco* remained indebted to the Appellant in the said 100 *l.* upon Note, and in *June 1723*, above a Year after the Election, borrowed 400 *l.* more on his Promisory Note; and in *July 1724*, he borrowed 150 *l.* more on his Note, and the Appellant desiring a Bond, the Respondent *Brisco* came to the Appellant at *Edenball*, and *Mr. Gibson's* Accounts and the Respondents said three Notes being produced by *Mr. John Beech*, it was agreed, that the Respondent *Brisco* was fully paid all his Demands on the Appellant; and the Respondent *Brisco* then agreed, that the said 100 *l.* 400 *l.* and 150 *l.* making 650 *l.* Principal Money, (*besides 46 l. 15 s. Interest which the Appellant abated*) was then due from him to the Appellant; but there being no Stamp Paper to be had that Night, the Respondent *Brisco* desired *Mr. Beech* to prepare a Bond the next Morning, and before and after Supper, the Appellant said to the Respondent, *I doubt I have not made you Satisfaction for the Trouble and Expence you have been at in the Election; I think I should have allowed you something more.* To which he made Answer, *Sir Christopher, you have always been very generous to me, and I will not have any thing more, and declared the Bond should be for 650 l. and after Supper, he said, That the taking no Interest was more than he could expect, and again desired Mr. Beech to draw the Bond for 650 l. but the Appellant ordered the Interest should be only 4 l. per Cent. with which the Respondent expressed himself pleased, and the next Morning, executed a Bond for Payment of 650 l. with Interest at 4 l. per Cent. and the same Day left the Appellant's House, and through Mistake, left behind him the said three Notes, for which he wrote to Mr. Beech soon after, and, in the same Letter, takes Notice that he had forgot to pay for the Bond, but desires Mr. Beech not to charge it to the Appellant: So far was the Respondent at that Time from imagining the said Bond was given on any other Account than a just Debt then due and owing from the Respondent to the Appellant.*

The Appellant owing to the Respondent *Dorothy* (*then the Widow of Richard Lamplugh, Esq.*) 900 *l.* on Note, which she delivered to the Respondent *Brisco*, her Father, and therewith a Letter to the Appellant, desiring his Bond for the said 900 *l.* the Appellant paid the Respondent *Brisco* 15 *l.* for Interest, and executed a Bond in 1800 *l.* Penalty, conditioned to pay the Respondent *Dorothy* 900 *l.*

Matters rested thus until after the 650 *l.* Bond became payable, when the Appellant being desirous to have the same paid, the Respondent *Brisco*, wrote to excuse his Non-payment thereof. And afterwards, on the first of *May 1726*, the Respondent *Brisco*, having the 900 *l.* Bond in his Custody, and being (as the Appellant apprehended) entrusted therewith by his Daughter, came to the Appellant's House, and acquainted the Appellant, that he had brought his Daughter's said Bond, and proposed that the Appellant should discharge the same, by delivering up the Bond for 650 *l.* and giving a Note for 250 *l.* Residue of the 900 *l.* Principal (till he could with more Conveniency pay the same) and that the Difference of Interest (if any) on either Side, should be paid down, to which the Appellant agreed; and the Respondent *Brisco* produced the 900 *l.* Bond, and the 650 *l.* Bond being brought to the Appellant by *Mr. Beech*, by the Appellant's Order, a Computation was made of the Interest, and it appearing that the Interest on the 650 *l.* Bond exceeded the Interest on the 900 *l.* Bond, in the Sum of 12 *l.* 3 *s.* 4 *d.* the Respondent laid down 12 Guineas, and desired Change from the Appellant, who went out of the Room, leaving both the said Bonds on the Table, to fetch an Half Guinea, which he paid the Respondent, who gave him the 1 *s.* 6 *d.* Difference in Silver.

The Account of Interest being thus discharged, the Appellant gave the Respondent *Brisco*, his Note for 250 *l.* with Interest, on Demand, and cancelled the 650 *l.* Bond; and the Respondent having received a full Satisfaction of the said 900 *l.* Bond, cancelled or destroyed the same, as the Appellant apprehended, the Respondent *Brisco* then tearing a Paper, into small Pieces, as if it were the said Bond, and the Appellant had not the least Distrust of any Imposition practised upon him by the Respondent.

The Respondents *Ward*, and *Dorothy* his Wife, intermarried in *June 1726*, and in *July* following the Appellant paid the Respondent *Brisco* 150 *l.* in Part of the said Note, and on the 23d of *September* following, the Appellant discharged his said 250 *l.* Note, by paying to the Respondent *Brisco* the remaining 100 *l.* with all Interest due thereon: In all which Time he heard of no Objection made by the Respondents *Ward* or his Wife, to his having discharged the said 900 *l.* to her Father as aforesaid, although the Appellant sent her Notice thereof by a Letter delivered to her in *May* aforesaid; and the Appellant had no Suspicion that such Bond was uncanceled, until the Respondent *Brisco* wrote a Letter to the Appellant, dated the 12th of *November 1726*, intimating, that the Respondent *Ward* was desirous to have the Money the Appellant owed his Wife by Bond paid in, and after some Letters had passed between them, the Appellant wrote a Letter, which he sent open by *Mr. Beech*, (who was acquainted with the whole Transactions) with the Accompt drawn up in Writing, and signed by the Appellant as it stood and was settled the 1st of *May 1726*, desiring the Respondent *Brisco*, to sign a Dupli-

a Duplicate of such Accompt, or give a Reason why the Appellant should be called upon to pay the Money already accounted for to him.

Letter dated Nov.
21, 1726.

Mr. Beech delivered the Letter and shewed the Account, and (upon expostulating with him touching the said Matters) asked, Upon what Consideration the Appellant had delivered up the 650 l. Bond and given the 250 l. Note? To which, the Respondent *Brisco* answered, *That the Appellant might very well give up the Bond when the Money was paid*; and told Mr. Beech (upon his Enquiry after it) that the 900 l. Bond was still in his keeping, but did not, in all his Discourse, pretend or mention any other Consideration for the Appellant's delivering up the 650 l. Bond, and giving the 250 l. Note.

Appellant's Bill
filed 15 Jan. 1726.

Appellant's Affidavit, annex'd to his Bill.

Upon Mr. Beech's Return, the Appellant went himself to the Respondent *Brisco*, and insisted upon his signing the Accompt, and desired a Sight of the Bond, if in being, but was refused both; and thereupon he sent Mr. Creighton an Attorney, to acquaint the Respondent, that unless he would sign the Account and deliver up the Bond (if in being) he would immediately file a Bill in Equity for a Discovery and Relief; and the Appellant being unable to obtain Justice by amicable Means, he pursued the Matter whilst recent, and filed his Bill in the Court of Exchequer against the several Respondents, praying, that in Case the said 900 l. Bond and Interest was not already paid to the Respondents *Ward* and his Wife, by the Respondent *Brisco*, he might be Decreed to satisfy the same, and indemnify the Appellant therefrom; and that the Bond for 900 l. might be delivered up to be cancelled, or that the Respondent *Brisco* might be Decreed to pay the Appellant the said several Sums of 650 l. and 250 l. with Interest. And in regard the Appellant was seeking Relief touching the Bond for 650 l. which was not in his Power to produce, the Appellant annexed his Affidavit to the said Bill, wherein he deposed (amongst other Things) "That the Respondent *Brisco* came to his House in May 1726, and brought with him his Daughter's Bond, and proposed to discharge the same by delivering up to the Respondent his said Bond for 650 l. and by the Appellant's giving the Respondent a Promissory Note for 250 l. more, which Proposal was agreed to, and (after adjusting the Interest, as above stated) the Bond for 650 l. was cancelled or torn in pieces, the Note for 250 l. was given by the Appellant, and the Bond for 900 l. was, as the Appellant did then apprehend, cancelled or destroyed; the Respondent *Brisco* at that Time producing a Paper with a Seal and the Appellant's Name to it, which he then cancelled, by pulling off the Seal and Name, or tearing or destroying the same, (which Paper the Appellant did not then in the least doubt, but was the said Bond for 900 l.)

Letter dated
15 March, 1726.

The Respondents *Ward* and his Wife, answered forthwith; but the Respondent *Brisco* wrote to the said *Gilfrid Lawson*, Esq; expressing great Uneasiness and Concern for the Event of the Cause: And in one Part says, *I desire the Favour of you to accommodate with him (the Appellant) in the best manner you can, the Disputes betwixt us.* And in another Part of the said Letter, he says: *I shall, if insisted on, pay the Money due on Mrs. Lamplugh's Bond.*

Bill amended April
28, 1727.

Upon Receipt of this Letter, Mr. *Lawson* sent to speak with the Appellant; and after some Discourse thereon, Mr. *Lawson* proposed to the Appellant, that if he would stop all Proceedings, the Respondent *Brisco* should cause the 900 l. Bond to Mrs. *Lamplugh* to be delivered up to the Appellant, who objected to staying Proceedings till the Bond was deliver'd up; but (being to go for Bath the next Morning) agreed, that in case the Respondent *Brisco* did by the Return of the Post, or soon after, cause the Bond to be delivered to Mr. *Hall* his Solicitor (then present) he should immediately thereon stay Proceedings: But the Respondent *Brisco* having, in his next Letter to Mr. *Lawson*, receded from the Offer in his former Letter, and the Proposal made pursuant thereto, and endeavouring to stipulate with the Appellant for Payment of half the Debt, the Appellant refused to hearken to any further Proposals; and thereupon amended his Bill, to have the Letters to Mr. *Lawson* set forth, and made the said Mr. *Lawson* a Defendant, who confessed the Receipt of the said Letters, and the Proposal made pursuant thereto, and owned the Receipt of two other Letters touching the said Dispute; but said he could not set forth the same, having at the Respondent *Brisco*'s Request in the last of his Letters, returned them all to him; though the Appellant apprehends, he ought to have kept the same in Justice to himself and all Parties concerned.

Respondent *Brisco*'s Answers.

The Respondent *Brisco* put in three Answers; but although he had wrote four Letters to the Respondent *Lawson*, which the Bill requires to be set forth verbatim, yet he sets forth only three Letters; and in particular omitted a Letter dated the 8th of April 1727, (mentioned in the Respondent *Lawson*'s Answer) which Letter the Appellant has Reason to believe, contained a full Submission to his Demands; for that the Respondent *Lawson*, upon Receipt thereof, wrote a Letter to the Appellant (who had before positively refused to agree on any Terms but delivering up the Bond) wherein he says: *I received last Night a Letter from Mr. Brisco, dated the 8th, by which I now understand his Meaning; and am satisfied upon two Minutes Conversation with you, this Matter would be concluded to your mutual Satisfaction.*

N.B. The Steward's Accompts were perused when the 650 l. Bond was given.

The Respondent *Brisco* in his Answers, admits the Receipt of the said 100 l. 400 l. and 150 l. and his giving promissory Notes for the same; and his giving a Bond for 650 l. in exchange of his Notes; but insists, the Bond was given as a colourable Security; and that the Appellant was then indebted to him for Money expended on Account of his Election, (to more than the amount of the 650 l. Bond) for which he promised, *as soon as he should have perused his Steward's Accounts*, to make Satisfaction when they should account touching the 650 l. Bond; and insists, that the Appellant also promised to make him a Satisfaction for a Leasehold Estate called *the Tythes of Westward*; which he pretends the Appellant had for several Years kept Possession of from him: And says, the 650 l. and upwards, had been expended by him for the Appellant's Use and Service in the Manner aforesaid, or some other Manner: And admits, that (the Appellant neglecting to make him Satisfaction for the several Matters aforesaid) he went to the Appellant's House to make a final Adjustment of all Matters in Difference between them; and for that Purpose carried with him his Daughter's said Bond for 900 l. intending to have allowed the Appellant off such Bond, so much as he should have allowed short of the whole 650 l. in Satisfaction of the said Account of Charges and Expences at Elections, and the said Leasehold Estate, being determined to have the said 650 l. Bond delivered up and cancelled: And admits the 900 l. Bond was produced and laid before the Appellant; and that he cancelled the 650 l. Bond, and gave a Note for 250 l. And tho' not one Penny of Money (besides the Balance of Interest) was paid by the Respondent, yet he pretends, the said Bond of 650 l. was delivered up in Payment of what was

was due to him on the Election Account, and in Satisfaction of *Westward Tythes*, and for a Disrepute brought upon his Family, and that he had no Authority from his Daughter to discount or give up the said Bond on the Considerations aforesaid. In his first Answer it is observable, that the Respondent avoids a Discovery of the said Letters wrote to Mr. *Lawson* on a Pretence, that Mr. *Lawson* was a Counsellor at Law, and that the said Letters were written as to one, with whom the Defendant advised; and that the Letters which he received from Mr. *Lawson* contained his Advice and Opinion to the several Cases and Points by the Respondent's Letters stated to Mr. *Lawson*, and therefore prays he may not set forth the same; and the Appellant on the like Pretence could not get a Discovery of the said Letters till the Respondent's third Answer, altho' there is nothing stated in the said Letters by way of Case or Points for any Councillor's Opinion; nor was the said Mr. *Lawson* ever a Practiser of the Law, that the Appellant ever heard of.

May 1, The Cause being at Issue, several Witnesses were examined on both Sides in the Court of Exchequer, and a Decree was made thereupon; and, the Court being of Opinion, that the Matter in Difference between the Parties be tried at Law, it was thereupon ORDERED, That the Respondents *Ward* and his Wife should bring an Action against the Appellant upon the 900*l.* Bond, in the Office of Pleas of the said Court; to which Action the Appellant should plead as he should be advised, and that the Cause should be tried at the next Assizes for the County of *Cumberland*, by a Special Jury, and that the Depositions in the Cause should be used on either Side at the Trial; and the Equity of the Cause was reserved till after the Trial: And in the mean time the Appellant's Bill as to all the other Defendants (except the Defendant *Lawson*) was to be retained; and as to the Defendant *Lawson*, the Bill was dismissed with Costs.

on the reserved 1729. The Respondents *Ward* and his Wife, brought an Action against the Appellant, and declared upon the 900*l.* Bond: To which the Appellant was advised not to plead, *being resolved to appeal to your Lordships as soon as the Parliament should meet*: And thereupon they brought the Cause to a Hearing upon the Equity reserved; when the Appellant making Default, the Court ORDERED, That the Respondents *Ward* and his Wife should be at Liberty to sign Judgment on their said Action, and referred it to the Deputy Remembrancer to compute Principal and Interest on the Bond, and to Tax the Respondents *Ward* and his Wife their Costs at Law and in Equity, and make his Report; and that upon the Appellant's paying such Principal, Interest and Costs two Months after the Report, the Bond should be delivered up, and a perpetual Injunction issue; but in Default of such Payment, his Bill was to be dismissed as against the Respondents *Ward* and his Wife, with Costs: And ORDERED, That the Bill as against the Respondent *Brisco*, should then stand dismissed with Costs.

From which several Decrees, the Appellant has appealed to your Lordships; and conceives he is aggrieved thereby, and that the same ought to be reversed and rectified, for the following, among many other REASONS:

For that by the first Decree it appears, the Court was of Opinion the Matters in Difference between the said Parties should be tried at Law; Yet without directing any particular Issues, It was Ordered, That an Action should be brought by the Respondents *Ward* and his Wife upon the 900*l.* Bond, to which the Appellant was to plead as he should be advised. Whereas the Appellant apprehends and is advised, that he could plead nothing at Law which could put the Matters in Difference betwixt the Parties, properly in Issue.

Admitting that a proper Plea could have been advised to put the Matters in Difference in Issue, yet as the Direction now stands, *That the Respondents Ward and his Wife bring the Action*, it would be incumbent upon the Appellant to prove an Authority from the Respondent *Dorothy* to her Father, to which the Appellant is a Stranger, and they both deny any such Authority by their Answers; without which Proof the Appellant must fail at Law on such Action, tho' all the rest of his Case should be prov'd with the utmost Clearness. And one part of the Matter in Difference, between the Parties is, whether the Respondent *Brisco* had any Authority from the Respondent *Dorothy* to make the Agreement; yet the Respondent *Brisco* coming with that Pretence, and bringing the 900*l.* Bond with him, whereby he obtain'd the 250*l.* Note to be given, and the 650*l.* Bond to be cancelled, the Appellant apprehends he is entitled to Relief in Equity.

For, that by this Decree the Action must be brought by the Respondents *Ward*, and his Wife, the Obligee in the 900*l.* Bond, and neither *Brisco's* Answer, nor any thing that he had said or wrote, could have been used in Evidence at Law against the Plaintiffs in that Action, though it appears upon the whole Case, that in Equity the Respondent *Brisco* is chiefly concerned in Interest.

Because it appears upon the Merits, that the Appellant is intitled to Relief, either by having the Bond of 900*l.* decreed to be delivered up, or by obliging the Respondent *Brisco* to pay the Money due thereon to the other Respondents, he having received that which ought to be applied in Satisfaction thereof, by cancelling the Bond of 650*l.* and accepting the Note for 250*l.* which was afterwards paid.

It is pretended by the Respondent *Brisco*, in his Answers, that the cancelling the 650*l.* Bond, and giving the 250*l.* Note (which tallies with the 900*l.* Principal) was not done in Satisfaction or Discharge of the 900*l.* Principal Money due on his Daughter's Bond, or upon Account thereof; although he admits that he went to the Appellant, on the first of May 1726, to make a final Adjustment of all Matters between them, and for that Purpose put the said 900*l.* Bond into his Pocket, with Intention to have allowed (or indorsed) off the 900*l.* Bond, so much of the 650*l.* due on his own Bond, as the Appellant should not allow him in Satisfaction of the Election Account, and for the Tythes of *Westward being determined to have the 650 l. Bond delivered up and cancelled*; and admits the 900*l.* Bond was produced and laid before the Appellant; and though the Respondent declared to Mr. *Beech*, upon his paying the 100*l.* Residue of the 250*l.* Note, that the Appellant had taken only 4*l.* per Cent. Interest from him (which must be at the Time of the Transaction, on the first of May 1726, or not at all, there being no Account between them, except what is before-mentioned) and therefore refused to take any greater Interest of the Appellant, and afterwards insinuated to Mr. *Beech*, that he had paid the 650*l.* Bond; yet in his Answers the Respondent *Brisco* denies any Payment at all of the 650*l.* Bond, or any Discount or Satisfaction of Interest, and sets up the three following pretended Considerations for the Appellant's

pellant's cancelling the 650 l. Bond, and giving the 250 l. Note; and upon those three Points he puts the whole Merits of his Cause.

I.

That the same was done as a Satisfaction for Money due to him on account of Money laid out, and Services done for the Appellant in Elections; and that upon a strict Account he was not indebted to the Appellant in so great a Sum as 650 l. for which his Bond was given.

Answer.

To which it is answered, That the Respondent *Brisco* does not pretend to have kept any Account of any thing due to him on the Elections; nor has he proved any thing due to him on that or any other Account, and admits he never made any Demand thereof; but, on the contrary, it is clearly proved, that when the 650 l. Bond was given, the Respondent *Brisco* was fully satisfied on account of the Elections. And that the Bond was given for a real Debt upon adjusting the Account between the Appellant and Respondent, the 31st of *December* 1724, and the Respondent *Brisco* then expressed his Gratitude to the Appellant for abating the Interest due on the Notes, and ordering the Bond to carry Interest at 4 l. per Cent. only; and was so far from apprehending that the Bond was only a colourable Security, as pretended by his Answer, That having forgot to pay for the Bond, he wrote the next Day to Mr. *Beech*, to excuse it, and desired he would not charge it to the Appellant, for that he himself would pay for it, and there are several other Circumstances to confirm the Justice of his giving the Bond for 650 l.

II.

As a Satisfaction for a *Lease of Tythes* which he pretends did belong to his Family, and have been kept from him by the Appellant.

Answer.

To which it is answered, That there is not the least Colour of Evidence of any Right in the Respondent; Nor does he by his Answer so much as state his Title, or Pretensions of any Title thereto, and the Appellant's Family have held the same above 60 Years past by *Lease* from the Dean and Chapter of *Carlisle*, renewable every seventh Year: And notwithstanding any thing pretended by the Respondent's Answer, and aimed at by his Proofs, it appears by his Letters wrote before the first of *May* 1726, that he only desired the Appellant would let him have the said *Lease of Westward Tythes* in exchange for another Estate of greater Value, in regard the Tythes (as pretended by such Letters) lie near the Respondent's Estate, and anciently belonged to his Family, but were taken from them by the Dean and Chapter of *Carlisle*; and the Respondent in two Letters, wrote to the Appellant after the said 650 l. Bond was cancelled, continues his Application for the Exchange; but in the second Letter, wrote in Answer to one from the Appellant, he says; *I despise the Lease on any Consideration*: All which is very inconsistent with the Respondent's Pretence, that the Bond was cancelled, and the Note given in Satisfaction of that Demand,

III.

As a Satisfaction for a Disrepute pretended to have been brought on his Family by a supposed unlawful Conversation with the Respondent *Dorothy* his Daughter, then the Widow of *Richard Lamplugh*, Esquire.

Answer.

To which it is answered, That there is no Proof made that the Bond was cancelled, or the Note given on that Account, nor, considering the Circumstances of the Person said to be injured, who was then a Widow, and is since married, is there Reason to think it should be so. Upon the Whole it appears, that the Bond for 650 l. being a real Debt, was actually cancelled, and that then the Note for 250 l. (which exactly tallies with the 900 l. Bond) was also given, and no Consideration is pretended by the Respondent *Brisco* for the same, but what is falsified, or incredible.

Wherefore, and for divers other Reasons, the Appellant humbly appeals from the said two Decrees, to your Lordships Judgment; and hopes your Lordships will reverse and rectify the same, and relieve him according to the Prayer of his said Bill, or give such other Directions for his Relief in the Premises, as to your Lordships, in your great Wisdom, shall seem meet.

THO. LUTWICHE.
N. FAZAKERLEY.

Sir Christopher Musgrave, Bart. - Appellant.
John Brisco, Esq; and Others - Respondents.
The Appellant's CASE.

*To be heard at the Bar of the House of
Lords on Tuesday the 7th Day of April,
1730.*